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No. 04-368

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ARTHUR ANDERSEN LLP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 12,200 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

NACDL was founded in 1958 to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and fair administration of justice, with a focus on the role and duties of lawyers representing parties in administrative, regulatory, and criminal investigations. In furtherance of this and its other objectives, NACDL files approximately 35 *amicus curiae* briefs each year, in this Court and others, addressing a wide variety of criminal justice issues.[1] NACDL has a particular interest in this case because the decision of the court below could interfere with the ability of NACDL's members to represent their clients, expose NACDL members to punishment for fulfilling their ethical duties to clients, and undermine the adversarial process essential to fairness in the criminal justice system.

SUMMARY OF ARGUMENT

This case places lawyers at risk of investigation, prosecution, and imprisonment for doing their jobs. When a

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored any part of the brief, and no person or entity other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

lawyer represents a client in connection with a potential government investigation, one of the lawyer's goals may appropriately be to prevent the government from developing evidence against the client. Within the bounds of ethics and the law, that is what lawyers do.

By expanding the definition of "corruptly persuades" in 18 U.S.C. § 1512(b)(2) to encompass legal advice directed to that end, the Fifth Circuit's ruling will chill zealous legal representation, create potential conflicts between counsel and client, and undermine faith in the privacy of attorney-client communications.

This case is a prime illustration of the dangers unleashed by the Fifth Circuit's approach. In prosecuting the accounting firm Arthur Andersen LLP ("Andersen"), the government singled out the conduct of an in-house lawyer, Nancy Temple. Her crime, in the government's view, was providing legal advice even before the SEC had issued a subpoena or launched a formal investigation. Specifically, she reminded Andersen employees to adhere to a lawful, established document retention policy and recommended changes to a draft memorandum – actions that lawyers undertake every day. According to several of the jurors, her edits to the draft memorandum were the principal basis for Andersen's conviction.

By criminalizing this conduct, the Fifth Circuit disregards the traditional role of lawyers, which includes a duty to protect their clients by deflecting potential government investigations. In the court's view, this goal itself is "improper" and reflects a "corrupt" purpose. Any action by the lawyer – such as vigorously asserting privileges, counseling potential witnesses about their rights, or, as here, advising employees about a company's document retention policy and editing a draft memorandum – can violate the witness tampering statute if it is motivated even in

part by this goal. Lawyers in the post-*Andersen* era now will operate in fear of investigation and prosecution. Those fears inevitably will dampen the zealousness of their advocacy. And that will imperil the fair administration of justice.

If allowed to stand, the decision below also will damage the attorney-client relationship by engendering potential conflicts of interest between lawyers and clients. On every close call regarding tactical and legal issues – and on many that are not so close – lawyers will have to weigh in the balance their own potential exposure to criminal liability. Yet the fundamental tenet of the attorney-client relationship is that the lawyer's commitment to the client must be undiluted by concerns for his or her own personal interests. Moreover, by expanding the government's ability to investigate counsel, the Fifth Circuit's decision undermines the communication between attorney and client. If the advice of the Andersen lawyer here amounts to witness tampering, then communications long assumed to be privileged are in jeopardy of disclosure under the crime-fraud exception. Clients who are uncertain of the loyalty of their counsel or the confidentiality of their communications will simply not disclose information their lawyers need to know. That, too, imperils the fair administration of justice.

Although the obstruction of justice provisions are not intended to reach "lawful, bona fide, legal representation," 18 U.S.C. § 1515(c), the Fifth Circuit's decision leaves this so-called "safe haven" an empty defense. Under the jury instructions that were upheld below, any legal advice that makes it harder for the government to develop evidence may "impede" an investigation; that which impedes is "improper"; that which is improper is "corrupt"; and that which is corrupt is unlawful. The government will likely repeat in future cases the argument it advanced in this one: Conduct that falls within the broad scope of Section 1512(b) is criminal, and thus not protected as lawful, bona fide legal representation.

The Fifth Circuit's extraordinarily expansive ruling thus collides with the fundamental premises underlying our system of justice. It is important that the Court reverse this holding to prevent further damage to the rights of defendants, the attorney-client relationship, and the integrity of the judicial process.

BACKGROUND

Beginning in October 2001, as press reports revealed apparent financial problems at Enron Corporation, employees of Andersen – Enron's accountants – began to recognize the possibility of SEC or other regulatory inquiries. Several of the employees realized that the Enron audit team at Andersen had not been following established document retention policies, and reminded those employees to do so. Part of the document retention policy required the deletion of draft documents, while leaving the final versions in Andersen's files.[2]

On several occasions, Temple, an in-house lawyer, reminded Andersen employees to follow Andersen's document retention policy. For example, on October 12, 2001, Temple advised certain Andersen partners that "[i]t might be useful to consider reminding the engagement team of our documentation and retention policy. It will be helpful to make sure that we have complied with the policy." GX 1012A.

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[2] Even the government did not argue at trial that the document retention policy itself was illegal. The policy required destruction only of materials that were not part of the audit file. Anything necessary to support the final audit report was preserved and only superseded drafts or other materials not used to support the testing performed in the audit were destroyed. GX 160A.

Citations to "GX" refer to the government's trial exhibits and "R." to the record filed in the Fifth Circuit.

On October 16, 2001, Enron issued a quarterly earnings release to the public. David Duncan, Andersen's lead partner on the Enron engagement, had serious concerns about Enron's characterization of certain charges as "non-recurring." Duncan had expressed his concerns to Enron officials, but the release was not changed. Duncan decided to write an internal draft memorandum documenting the disagreement. He circulated the draft memorandum to Andersen partners in the practice risk management group and to Temple.

Temple e-mailed suggested changes and copied the partners in the practice risk management group. GX 1018B. Specifically, her e-mail proposed that Duncan "delet[e] some language that might suggest we have concluded the release is misleading." *Id.* She also recommended removing "reference to consultation with the legal group and deleting my name on the memo," in order to avoid a waiver of the attorney-client privilege and to reduce the likelihood that counsel might be called as a witness. *Id.* She indicated that she would consult further with the legal group about additional steps to limit Andersen's exposure under securities law. *Id.*

Andersen employees continued to take steps to comply with the established document retention policy into November, when Andersen received an SEC subpoena. At that time, Andersen immediately directed its employees to preserve all documents related to the Enron engagement.

The government charged Andersen with knowing and corrupt witness tampering under 18 U.S.C. § 1512(b)(2). The indictment focused entirely on the alleged destruction of documents related to Andersen's auditing work for Enron. The government charged that Andersen officials had obstructed an official proceeding by "corruptly persuad[ing]" employees to shred documents and to delete electronic

records to keep them from the SEC. The government's theory was that, at the time of the charged offense, the Andersen officials anticipated an SEC investigation of Enron's accounting practices, even though Andersen had received no subpoena or other formal notice of such an investigation.

At trial, the government offered into evidence e-mails and notes from Temple – including the e-mail exchange regarding Duncan's internal memorandum about the Enron earnings report. Temple was one of several Andersen officials, but the only lawyer, whom the government accused of acting corruptly.

After 10 days of deliberations and an *Allen* charge, the jury convicted Andersen on the sole count of witness tampering. The court's instructions to the jury had broadly defined the term "corruptly persuades" in 18 U.S.C. § 1512(b). The prosecution had argued vigorously that Temple's legal advice was part of a pattern of obstruction, and the court's charge allowed the jury to convict on that basis. Indeed, it appears that the jurors convicted Andersen solely based on Temple's advice – specifically, her four paragraph e-mail proposing changes to the draft memorandum. According to a post-conviction press conference with four jurors and press interviews with several others, the jury determined that Temple was guilty of "corruptly persuad[ing]" others with "the intent to make evidence unavailable at an official proceeding" because she suggested edits to the draft.[3] The jury was apparently not

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[3] *See, e.g.*, Jonathan D. Glater & John Schwartz, *Jurors Tell of Emotional Days in a Small Room*, N.Y. Times, June 17, 2002, at A14 (juror Wanda McKay stating: "When we looked at the Nancy Temple stuff, and with the instructions that the judge gave us, there was no way we could not find Arthur Andersen guilty. . . . Nancy Temple was found guilty of altering one document . . . . One person did one thing and tore

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persuaded that the government's evidence of document destruction established guilt.[4]

On appeal, the Fifth Circuit affirmed the conviction. The court held, among other things, that the trial court had properly instructed the jury regarding the definition of "corruptly persuades" in 18 U.S.C. § 1512(b).

ARGUMENT

I. LAWYERS HAVE A DUTY TO DEFEND THEIR CLIENTS ZEALOUSLY, WHICH PROPERLY INCLUDES STRATEGIES TO LIMIT LIABILITY IN POTENTIAL GOVERNMENT INVESTIGATIONS.

Forceful and vigorous advocacy is the duty of the lawyer, the right of the client, and the foundation of our adversarial system of justice. That system, as this Court has held, "is premised on the well-tested principle that truth – as well as fairness – is best discovered by powerful statements on both sides of the question." *Penson v. Ohio*, 488 U.S. 75, 84-85 (1988) (quotations omitted). An attorney has a

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the whole company down."); Mary Flood, *The Andersen Verdict; Decision by Jurors Hinged on Memo*, Hous. Chron., June 16, 2002, at A1 (jury foreman stating that Temple e-mail "was a 'smoking gun.'"); Tom Fowler & Todd Ackerman, *The Andersen Verdict; Andersen Guilty; Outcome Viewed as Final Blow For Firm*, Hous. Chron., June 16, 2002 at A1 (reporting that several jurors said they unanimously agreed that Temple was the "corrupt agent").

[4] *See, e.g.*, Cassell Bryan-Low, *Andersen: Called to Account: Foreman Was Last to be Persuaded*, Wall St. J., June 17, 2002 at C13 (jury foreman stating, "We had to ensure that someone corruptly persuaded someone else to do something that would result in the impairment of a fact-finding capability of an official proceeding . . . . [T]hat almost had nothing to do with shredding documents.").

"constitutional duty to advocate zealously on the client's behalf." *McCoy v. Ct. of Appeals*, 486 U.S. 429, 447 (1988). Indeed, the "constitutional requirement of substantial equality and fair process . . . can only be attained where counsel acts in the role of an active advocate in behalf of his client." *Id.* (quotations omitted). Particularly in the context of criminal law, zealous representation is not simply desirable but constitutionally mandated. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 689 (1984) (discussing defense counsel's "overriding mission of vigorous advocacy of the defendant's cause").

Attorneys have an ethical obligation to represent their clients zealously and diligently within the bounds of the law. *See* Model Rules of Prof'l Conduct R. 1.3 cmt. 1 (2004) [hereinafter Model Rules]. Further, a lawyer must "take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor," "despite opposition, obstruction or personal inconvenience to the lawyer." *Id.* Indeed, "[t]he advocate has a duty [properly] to use legal procedure for the fullest benefit of the client's cause . . . ." Model Rules R. 3.1 cmt. 1. Thus, lawyers are obligated to do their utmost in defending a client under investigation. And they are obligated to pursue the client's objectives through all means permitted by law.

Of course, individuals who are potential targets of an investigation have every right under the Fifth Amendment to remain silent and to decline to assist the government in putting together its case. And inevitably in the practice of law a zealous advocate will devise and execute legitimate strategies intended, at least in part, to deflect an investigation. In essence, that is a lawyer's job. *See, e.g., Ferri v. Ackerman*, 444 U.S. 193, 204 (1979) ("Indeed, an indispensable element of the effective performance of [defense counsel's] responsibilities is the ability to act

independently of the Government and to oppose it in adversary litigation.").

This Court has even recognized that professional obligation as a defendant's constitutional right. In *Miranda v. Arizona*, the Court stated:

> An attorney may advise his client not to talk to police until he has had an opportunity to investigate the case . . . . In doing so an attorney is merely exercising the good professional judgment he has been taught. This is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under his oath – to protect to the extent of his ability the rights of his client. In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution.

384 U.S. 436, 480-81 (1966). *See generally* Henry J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1288 (1975) ("Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client's cause by any ethical means. Within the limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty."); Kenneth Mann, *Defending White Collar Crime* 5 (1985) ("[T]his is the central theme of the white-collar crime defense function, the defense attorney works to keep potential evidence out of government reach by controlling access to information."); Julie R. O'Sullivan, *Federal White Collar Crime* 12 (2001) ("[T]he challenges facing defense counsel are . . . limiting, consistent with ethical and legal constraints, government access to incriminating evidence . . . .").

II. THE FIFTH CIRCUIT'S INTERPRETATION OF "CORRUPTLY PERSUADES" IS WRONG.

Despite the well-established professional obligations of lawyers and the legal rights of clients, the Fifth Circuit interpreted 18 U.S.C. § 1512(b)(2) to criminalize legal advice offered to impede fact-finding in an official proceeding.

The language of the statute is not so all-encompassing. Section 1512(b)(2) makes it a crime to "corruptly persuade[] another person" with the intent to "cause or induce any person to . . . withhold a record, document, or other object, from an official proceeding; [or] alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding . . . ." 18 U.S.C. § 1512(b)(2)(A)&(B). The district court, in instructing the jury, defined the term "corruptly persuade" to mean "having an improper purpose," which it in turn defined as "an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding." Pet. App. 18a, 48a. Unfortunately, these instructions, as approved by the Fifth Circuit, sweep in a broad range of legitimate attorney conduct. This interpretation of "corruptly persuades" is both wrong and dangerous.

The term "corruptly" necessarily requires more culpability than the mere intent to hinder an investigation. The jury instructions that the Fifth Circuit upheld essentially read the word "corruptly" out of the statute and conflate "an improper purpose" with another requirement of the provision – the intent to make evidence unavailable to an official proceeding. The Fifth Circuit's decision tries, but fails, to show that these two intent requirements are *not* strictly identical. *See* Pet. App. 21a-23a (distinguishing intent to induce another to make document unavailable and intent to hinder fact-finding ability of proceeding, which implies greater "degree of personal culpability"). The jury was never

asked to draw such a fine line, nor could they be expected to do so.

The record in this case highlights the futility of the court's exercise in wordplay. If a lawyer, or – as here – the lawyer's client, can be guilty of subverting, undermining, or impeding the fact-finding function of an investigation simply by conveying routine legal advice about an accepted document retention policy or suggesting changes to a draft internal memorandum, then it is difficult to discern the outer boundaries of potential liability. Indeed, if to "impede" an investigation is to "hold [it] up," as the Fifth Circuit defined the term, Pet. App. 22a, any action intended to reduce the availability of information and make investigators look elsewhere to build their case would constitute a crime.

Under the Fifth Circuit's opinion, routine legal judgments could be considered "corrupt" and expose an attorney to criminal liability. For example:

- An in-house attorney is asked to review a draft report that must be sent to the SEC. The lawyer and client are well aware that after the report is issued, the government will likely use it in an anticipated investigation. The lawyer suggests changing the language of the draft to exclude factual information that is not technically required in the report, but which he knows would greatly assist the government's fact gathering. The client deletes the offending language. The lawyer's advice would "cause . . . [a] person to . . . alter . . . an object," potentially in violation of Section 1512(b)(2)(B).

- A client possesses critical (and exclusive) information in a case being investigated by the government and likely to proceed to the grand

jury stage. Investigators request an informal interview and the lawyer advises the client not to cooperate. The client follows that advice and the government never learns the critical facts. Under the Fifth Circuit's reasoning, the lawyer's advice would potentially violate Section 1512(b)(2)(A) because he "induce[d] [a] . . . person to . . . withhold testimony . . . from an official proceeding."

- A client is subpoenaed before a grand jury. She has relevant information but is concerned about embarrassment or perhaps unrelated civil consequences should the information ever become public. Her lawyer counsels her not to volunteer any information, to answer only the question asked, and to interpret the scope of each question as narrowly as possible. The client follows the advice. The government fails to ask the right questions and never learns the information that she does not volunteer. Again, the lawyer's advice has "induce[d]" the withholding of testimony from an official proceeding, potentially in violation of Section 1512(b)(2)(A).

- A client corporation receives a grand jury subpoena for documents as part of an antitrust investigation. The lawyer advises the client that certain documents, such as the personal calendars of company executives, are personal documents, not corporate documents, and hence are not responsive to the subpoena even though they contain relevant information. As a result, the client does not produce documents that would help the government build its case. The lawyer's advice would potentially violate Section 1512(b)(2)(A) because it "cause[d] [a] . . . person

to . . . withhold a . . . document . . . from an official proceeding."

In each case, the attorney – whether in-house or outside counsel – has devised strategies and "persuaded" the client to follow them for the purpose, in part, of preventing the government from learning factual evidence. These examples, every bit as routine and, under the Fifth Circuit's standard, every bit as "corrupt" as the advice in *Andersen*, demonstrate the extraordinary reach of the Fifth Circuit's decision in several respects:

First, the Fifth Circuit's interpretation of the term "corruptly" extends to other provisions of Section 1512, which prohibit far more than the destruction or alteration of documents. Under Section 1512(b)(1), for example, it is unlawful to "corruptly" persuade another person with the "intent to influence, delay, or prevent the testimony of any person in an official proceeding." Under Section 1512(b)(3), it is unlawful to "corruptly" persuade another person with the intent to "hinder, delay, or prevent" the reporting of a possible Federal offense to a law enforcement officer.

Second, the Fifth Circuit made clear that the government can prove obstruction even though a lawyer's intent to impede an investigation is not his or her exclusive, or even primary, goal. The district court defined "corruptly" as having "*an* improper purpose" and directed the jury that "[t]he improper purpose need not be the sole motivation for the Defendant's conduct so long as the Defendant acted, at least in part, with that improper purpose." Pet. App. 48a (emphasis added). Thus, a lawyer could have numerous legitimate and overriding motives for giving legal advice – preserving the attorney-client privilege, complying with ethical obligations, testing the legal bases of the government's claims – but if she also intends in part to deflect an investigation, she has committed a crime.

Third, the broad sweep of the term "official proceeding" in Section 1512, as defined by the Fifth Circuit, magnifies the risk of liability for lawyers. Section 1512 provides that the "official proceeding need not be pending or about to be instituted at the time of the offense." 18 U.S.C. § 1512(f)(1). The district court declined to instruct the jury, as Andersen had requested, that an official proceeding had to be "ongoing or . . . scheduled to be commenced" or even that the corrupt persuader must have "had in mind a particular proceeding that it sought to obstruct." Pet. App. 26a. It was legally irrelevant, in other words, that there were "investigators around the corner" in this case. Pet. App. 25a. Under the Fifth Circuit's reasoning, a lawyer is vulnerable if there is a potential investigation of one sort or another anywhere on the horizon.

The language of the statute does not compel this assault on common sense. As Andersen argues in its brief, the term "corruptly" necessarily requires something more – for example, an independent violation of the law – than rendering advice with the intent, in part, to make evidence unavailable to the government.

III. THE FIFTH CIRCUIT'S INTERPRETATION OF "CORRUPTLY PERSUADES" WILL CHILL THE ZEALOUS REPRESENTATION OF CLIENTS AND INTERFERE WITH THE ATTORNEY-CLIENT RELATIONSHIP.

As a result of the Fifth Circuit's decision, lawyers face a classic Catch-22. Conduct which itself is perfectly legal and proper – implementing a document retention policy, editing a draft memorandum, interpreting a subpoena narrowly – can limit the availability of evidence in a future government proceeding. But attorneys looking out for the best interests of their clients, as they are obligated to do, cannot recommend this conduct without a credible fear that

they might be found guilty of "corruptly persuading" another. The Fifth Circuit's reading of the statute thus deters the zealous representation that professional responsibility demands and erodes the trust that is critical to the attorney-client relationship.

These dangers are acute in the wake of the decision below. In blurring, if not erasing, the line between zealous advocacy and obstruction, the Fifth Circuit has made it impossible for a lawyer intelligently to ascertain where his constitutional and ethical duties as an effective advocate end, and where his exposure to criminal liability for witness tampering begins. Criminal defense lawyers and corporate counsel, uncertain of the reach of Section 1512 and how a prosecutor might perceive their conduct, may well curtail legitimate and zealous advocacy for their clients.

The Fifth Circuit's over-broad opinion also creates a potential conflict of interest between the lawyer and the client, compromising the attorney's duty of loyalty and impairing the attorney-client relationship.

This Court has long recognized that the constitutional right to counsel contains a correlative right to representation unimpaired by conflicts of interest or divided loyalties. *See, e.g.*, *Ferri*, 444 U.S. at 204 (noting that defense counsel's "principal responsibility is to serve the undivided interests of his client"); *Strickland*, 466 U.S. at 688 ("Representation of a criminal defendant entails certain basic duties. . . . [C]ounsel owes the client a duty of loyalty, [and] a duty to avoid conflicts of interest.") (citing *Cuyler v. Sullivan*, 446 U.S. 335, 346 (1980)). Other courts have followed suit, holding that a "defense attorney must be free to use all his skills to provide the best possible defense for his client." *Zuck v. Alabama*, 588 F.2d 436, 440 (5th Cir.), *cert. denied*, 444 U.S. 833 (1979); *see also id.* ("[A] defendant may not be

represented by counsel who might be tempted to dampen the ardor of his defense . . . .").

If zealous representation of the client exposes a lawyer to criminal investigation, he or she has a conflict of interest with the client. The risk of investigation and prosecution, as noted, may "dampen the ardor of [the lawyer's] defense," *id.*, with the consequence that counsel fails to provide legal advice and carry out other important strategies on behalf of the clients for fear of personal liability. *See, e.g.*, *United States v. Merlino*, 349 F.3d 144, 151 (3d Cir. 2003) ("An attorney who faces criminal or disciplinary charges for his or her actions in a case will not be able to pursue the client's interests free from concern for his or her own."), *cert. denied*, 124 S. Ct. 1726 (2004); *Mannhalt v. Reed*, 847 F.2d 576, 581 (9th Cir.) ("[W]hen an attorney is accused of crimes similar or related to those of his client, an actual conflict exists because the potential for diminished effectiveness in representation is so great."), *cert. denied*, 488 U.S. 908 (1988); *United States v. Cancilla*, 725 F.2d 867, 870 (2d Cir. 1984) ("What could be more of a conflict than a concern over getting oneself into trouble with criminal law enforcement authorities?"). Indeed, courts have reversed convictions when counsel faced personal consequences far less severe than a potential witness tampering conviction (fines and imprisonment of up to 10 years). *See* 18 U.S.C. § 1512(b).[5]

[5] *See, e.g.*, *Walberg v. Israel*, 766 F.2d 1071, 1077-78 (7th Cir.), *cert. denied*, 474 U.S. 1013 (1985) (granting writ of habeas corpus when lawyer's desire to receive future appointments from trial judge may have prevented defense counsel from pursuing vigorous defense); *United States v. Ah Kee Eng*, 241 F.2d 157, 161 (2d Cir. 1957) (recognizing potential for injustice when judge personally belittles defense counsel's positions because "[a] less experienced advocate might well have trimmed his sails . . . and thus have jeopardized the rights and the proper interests of a defendant on trial for a serious felony").

Any lawyer who must consider his or her own liability when revising a draft memorandum for a client is in an untenable position. The client is entitled to undiminished ardor, to representation untainted by the lawyer's personal concerns.

The Fifth Circuit's decision further threatens the essential flow of communication between attorney and client. For more than one hundred years, this Court has recognized that the "administration of justice" depends on the ability of individuals seeking legal assistance to confide in an attorney without the "apprehension of disclosure." *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888); *see also Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) ("The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.").

Confidentiality is the bedrock of the attorney-client relationship. *See, e.g.*, Restatement (Third) of the Law Governing Lawyers § 60 cmt. b (1998) ("[T]he confidentiality rule reflects a considered judgment that high net social value justifies it."); Laws. Man. on Prof. Conduct (ABA/BNA) 55:302 (May 20, 1992) ("[C]onfidentiality facilitates the fact-finding process that is critical to representation and also has the effect of encouraging early legal consultation."); Model Code of Prof'l Responsibility EC 4-1 (1980) (discussing "ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client"). A client's confidences have been protected both by the attorney's ethical duty of confidentiality and by the evidentiary privilege afforded to attorney-client communications.

The Fifth Circuit's interpretation of the witness tampering statute substantially expands a federal prosecutor's authority to inquire into attorney-client communications –

communications that were previously routine and did not raise any implications of criminal conduct. Discussions between attorney and client are not privileged if they are in furtherance of a crime or fraud. *See, e.g., United States v. Zolin*, 491 U.S. 554, 563 (1989).[6] As "impeding" the flow of information to a prosecutor is unlawful under the Fifth Circuit's approach, discussions between attorney and client directed to that end may not be privileged. Or at least aggressive prosecutors may so claim, seizing the opportunity the Fifth Circuit has created to subpoena counsel before the grand jury and seek to learn the contents of counsel's advice to his or her client.[7]

The mere potential for such meddling will undercut clients' faith that their communications with counsel will be confidential. Indeed, careful lawyers, at the outset of a relationship or at the inception of a conversation, may find it prudent to advise their clients of the risk that the communications between them may be disclosed. They may need to reiterate or highlight that advice as they make tactical decisions that anger the prosecutors or otherwise increase the likelihood that counsel will come under investigation. With a diminished assurance of confidentiality, the client may

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[6] Intrusion into attorney-client confidences has been justified by extreme circumstances such as an attorney's deliberate effort to tamper with witnesses, destroy subpoenaed materials, or engage in fraud upon the court. *See, e.g., Osborn v. United States*, 385 U.S. 323 (1966); *United States v. Myers*, 692 F.2d 823 (2d Cir. 1982), *cert. denied*, 461 U.S. 961 (1983); *In re Doe*, 662 F.2d 1073, 1080-81 (4th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982). The Fifth Circuit opinion greatly expands the circumstances in which the privilege may be pierced from the extreme to the routine.

[7] Likewise, a clever lawyer may use the Fifth Circuit's interpretation to invoke the crime-fraud exception in civil litigation and seek to discover his or her adversary's advice to clients, on the grounds that counsel impeded the flow of information to the court and thereby committed a crime.

choose not to speak candidly with the attorney. *See, e.g., Fisher v. United States*, 425 U.S. 391, 403 (1976) (recognizing that "the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice" if the client knew that damaging information could be obtained from his lawyer).[8]

The chill on attorney-client communications can arise even if the prosecution never in fact penetrates the attorney-client privilege. Prosecutors, newly emboldened by the Fifth Circuit's holding to investigate legal advice, may call counsel before the grand jury. Grand jury testimony is secret. The client will not know, other than through counsel's own report, what the lawyer said. Such testimony would breed mistrust and arouse the client's concern about the confidentiality of her communications to counsel.

By curbing the flow of information between attorney and client, such "apprehension of disclosure" imperils the attorney-client relationship and undermines the administration of justice. *See Hunt*, 128 U.S. at 470; *see also, e.g., Upjohn*, 449 U.S. at 388. Without complete information, counsel cannot effectively negotiate plea agreements and cannot determine what the client has to offer in cooperating with the government. Law enforcement could suffer, and the legal process will be less effective in ferreting out the truth.

It is no answer to trust in the wise discretion of the prosecution. To begin with, as has often been said, this is a

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[8] Since prudent and ethical counsel would so advise their clients prior to obtaining information, the Fifth Circuit's ruling could well drive clients who have something to hide "underground" – to lawyers who are not as ethical or careful, and therefore do not accurately apprise their clients of the potential incursions into privileged communications, and/or may be more likely to stray from the contours of appropriate advice or conduct.

government of laws, not of men. *See, e.g.*, *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 321 (1999). Moreover, it is the *potential* intrusion that creates the chill – exacerbated, no doubt, when the onslaughts actually occur, but abiding nonetheless even if they are infrequent.

IV. THE FIFTH CIRCUIT'S INTERPRETATION OF "CORRUPTLY PERSUADES" NULLIFIES THE SAFE-HAVEN FOR BONA FIDE LEGAL REPRESENTATION IN SECTION 1515(C).

Even before the witness tampering statute was amended to prohibit acts of "corrupt persuasion," Congress recognized the need to protect lawyers from being unfairly subject to criminal prosecution merely for zealously advocating on behalf of their clients. In 1986, Congress enacted 18 U.S.C. § 1515(c), which was designed to limit the obstruction of justice provisions by protecting attorneys who "provid[e] . . . lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding." According to the legislative history of Section 1515(c), Congress had received "complaints of prosecutor's [sic] harassing members of the defense bar." 132 Cong. Rec. 32,805 (Oct. 17, 1986) (Rep. Berman, introducing section-by-section analysis). Congress enacted Section 1515(c) to make clear that "[v]igorously and zealously representing a client . . . is not a basis for charging an offense under the obstruction of justice chapter." *Id.*

Several courts of appeals have recognized Section 1515(c) as a "safe harbor" for attorneys engaged in the practice of law and "a complete defense" to obstruction of justice. *See United States v. Kloess*, 251 F.3d 941, 948 (11th Cir. 2001); *United States v. Davis*, 183 F.3d 231, 248, *amended by* 197 F.3d 662 (3d Cir. 1999); *United States v. Kellington*, 217 F.3d 1084, 1098 (9th Cir. 2000); *United States v. Crawford*, 60 Fed. Appx. 520, 531 (6th Cir. Feb. 12, 2003) (unpublished decision).

The Fifth Circuit, however, apparently holds a different view. Although the decision below did not analyze or cite Section 1515(c), the court's interpretation of the phrase "corruptly persuades" in the witness tampering statute effectively vitiates the safe harbor provision for attorneys. Section 1515(c) protects only "lawful, bona fide" legal representation. Under the jury instructions upheld by the court below, however, any legal advice rendered with the intent to "impede" (*i.e.*, to "hold up") an investigation is "improper"; that which is improper is "corrupt"; and that which is corrupt is unlawful. It cannot, then, constitute "lawful, bona fide, legal representation." 18 U.S.C. § 1515(c). Thus, even as the lower court's reading of the statute intrudes deeply into the day-to-day practice of law, Section 1515(c) affords no real shelter, because the contours of "lawful, bona fide" legal representation are so narrow.

The record in this case not only exemplifies the risks posed by the Fifth Circuit's decision, it also demonstrates how that ruling annuls the safe harbor provision. As noted, one of the key pieces of evidence was an e-mail by in-house attorney Temple, recommending that a draft internal memorandum about Enron's quarterly press release drop "some language that might suggest we have concluded the release is misleading." GX 1018B. The government, in a post-conviction filing, argued strenuously that Temple had "advocated the creation of a deliberately misleading document to supersede a more damaging and accurate draft version which would be destroyed." R. 1423.

Lawyers review draft documents for their clients all the time. They routinely recommend revising or deleting inflammatory, pejorative, or potentially incriminating language, often, at least in part, to limit exposure in the event

of a possible future government investigation. In the words of one ethics scholar: "'Don't put it in writing' is advice lawyers give every day – to protect clients from creating documents that may be used, or often misused, to their detriment." Stephen Gillers, *The Flaw in the Andersen Verdict*, N.Y. Times, June 18, 2002, at A23. The advice is so routine that lawyers on the lecture circuit have a name for it, the *New York Times* rule: "Before writing something down, consider how it would look on the front page of the *New York Times*." *See, e.g.*, Jack V. Auspitz & Susan E. Quinn, *Litigators' View of Due Diligence*, 1368 PLI/Corp 107, 173 (2003); Ellis R. Mirsky, *Managing the Litigation Process*, 407 PLI/Lit 9, 30 (1991).

Nonetheless, the government in this case repudiated Andersen's suggestion that Temple was engaged in lawful, bona fide, legal representation. In its view, "Temple was not giving legal advice; she was giving illegal advice." R. 1415.[9] Under the Fifth Circuit's over-broad interpretation of Section 1512(b), this conclusion is probably unavoidable – which is precisely why the protection of the safe harbor provision is illusory.

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[9] Notably, the government did not stop there. Before the trial court, it argued that there is "no meaningful difference" between the lawyer's conduct in the case at bar and the following hypothetical situations:

- The memorandum's author is drafting the memorandum while the in-house attorney looks over his shoulder. She advises him to delete the word "misleading" as she watches him type it on his word processor.
- The memorandum's author consults with the in-house attorney *before* writing his first draft, and she advises him to leave the word "misleading" out of the document.

R. 1417 n.8 (responding to R. 1383 n.2). According to the government, these two scenarios and the lawyer's actual conduct in the case are tantamount to "coaching a witness to lie," and are "prohibited by the obstruction statutes." *Id.* Indeed, if the government is correct, they are also legally equivalent under Section 1512(b) to using intimidation, threats, or force to prevent a witness from testifying.

What was it about Temple's advice that rendered it illegal in the government's view? As the government made clear in the trial court, *any* legal advice to Andersen to hold back from offering a full and complete accounting of the truth could constitute witness tampering under the court's interpretation of the law – and as such, would not qualify as "lawful, bona fide, legal representation" under Section 1515(c). But if that suffices to blockade the safe harbor, then the harbor is not safe at all. Indeed, it would be inaccessible to those it is intended to protect. Lawyers making day-to-day and minute-to-minute judgments may find themselves at the wrong end of a criminal prosecution if the government takes issue with their turn of phrase.

This outcome is not an inevitable by-product of the statute. Rather, it is a direct consequence of the Fifth Circuit's over-reaching interpretation of Section 1512(b), which defines "corruptly persuades" in such broad strokes as to criminalize legitimate acts of legal representation. In contrast, the Eleventh Circuit has recognized that the concept of "an improper purpose" must give meaning to the safe harbor provision:

> In order to convict a defendant under Section 1512(b)(3), the government must prove that the defendant acted with an improper purpose. Section 1515(c) provides a complete defense to the statute because *one who is performing bona fide legal representation does not have an improper purpose.* His purpose – to zealously represent his client – is fully protected by the law.

Kloess, 251 F.3d at 948 (citations omitted and emphasis added). This kind of approach, essentially the inverse of the Fifth Circuit's, affords lawyers the necessary freedom to

represent their clients' interests without fear that zealous representation alone will lead to criminal prosecution.

CONCLUSION

The Fifth Circuit's flawed reading of Section 1512(b) intrudes on a broad range of conduct at the very core of the traditional functions that counsel perform. As a result of this decision, many lawyers may shy away from aggressive but legal strategies in defense of their clients, for fear of criminal investigation and possible prosecution. Whether intended or not, the decision below thus deters the zealous advocacy that the Rules of Professional Responsibility and the Constitution demand. Moreover, it impairs the attorney-client relationship and in particular impedes the flow of information between attorney and client, with potentially disruptive consequences for the courts. The statutory safe harbor, which should protect against these harms, does not do so, because the Fifth Circuit has essentially defined that provision out of existence.

The Court should correct the erroneous ruling below and reverse this conviction. The integrity of our system of justice is at stake.

Respectfully submitted,

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